A

JR LINKS EDUCATIONAL CONSULTANTS SDN BHD & ORS

v.

B

ORIX LEASING MALAYSIA BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL APPEAL NO: 1-12-55-03]
11 MAY 2006

C

CIVIL PROCEDURE: *Costs - Security for costs - Application for - Locus standi - Whether respondent has locus standi - Whether respondent entitled to make application - Rules of the High Court 1980, O. 23 r. 1(1), (3)*

D

CIVIL PROCEDURE: *Security - Security for appeal - Application for security of judgment sum in appeal - Courts of Judicature Act 1964, para 11 - The Royal Bank of Scotland Ltd v. Citrusdal Investments Ltd*

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I

This was the plaintiff-respondent's ("the respondent's") application by way of summons-in-chambers in encl. 16 seeking, *inter alia*, an order that the first defendant-appellant ("the appellant") provide security for costs in the sum of RM10,000 and as security for the appeal herein in the sum of RM33,000 to be paid into court within one month from the date of this order, failing which this appeal shall be deemed to have been struck out. The first appellant submitted that the respondent does not have the *locus standi* to make an application for security for costs, as O. 23 r. 1 of the Rules of the High Court 1980 ('RHC') and s. 351 of the Companies Act 1965 ('the Act') provide only for 'the defendant' and not 'the plaintiff' to make such an application. The respondent, however, contended that the respondent was entitled to bring this application on the basis of O. 23 r. 1(1) and (3) RHC and s. 351 of the Act as the first appellant was 'the plaintiff' while the respondent was 'the defendant' in this appeal. The issue that arose was whether the respondent came within the meaning of 'a defendant' for the purpose of making this application for security for costs pursuant to s. 351 of the Act read with O. 23 r. 1(1) and (3) RHC. It was also asserted for the appellant that the respondent's application for security for appeal in the judgment sum of RM33,000 was *mala fide* and an abuse of the process of the court as there was no provision in the Rules of the High Court 1980 for such application, adding that there was already an

application by the first appellant for stay of execution filed in the sessions court six months before the respondent's instant application. The respondent took the position that the application for security for appeal was an application for interim payment under O. 22A of the Rules of the High Court 1980 and the court was empowered to give such an order under s. 25A of the Courts of Judicature Act 1964.

Held:

(1) Under O. 23 r. 1(1) RHC, an order for security for costs may be made 'on the application of a defendant to an action or other proceeding in the High Court'. More specifically, the expression 'a defendant' to 'other proceeding in the High Court' would be the person defending the proceeding in the High Court. The proceeding when construed contextually must include the instant appeal, in which the respondent was the party defending or exercising its right to defend against attack in this appeal. Pursuant to O. 23 r. 1(3) RHC, the respondent becomes the party in the position of 'a defendant' in the appeal before the court and was entitled to make this application for security for costs. (para 10)

(2) This court applied the practical procedural approach contained in sch. para 11 of the Schedule to the Courts of Judicature Act 1964 and the principle enunciated in *The Royal Bank of Scotland.* On the foregoing grounds, this court made an order in terms of the security for costs and stay the second limb of this application for security of the judgment sum in the appeal until the final disposal of the application for stay of execution in the sessions court. (paras 18 & 19)

[Order accordingly.]

Case(s) referred to:

Dar International FEF Co v. Aon Ltd [2004] 3 All ER 986 ***(refd)***

Luminous Crossroads Sdn Bhd v. Lim Kong Huat Construction [2002] 5 CLJ 100 HC ***(refd)***

Naamlooze Vennootschap Beleggings Compagnie "Uranus" v. Bank of England & Ors [1948] 1 All ER 165 ***(refd)***

The Royal Bank of Scotland Ltd v. Citrusdal Investments Ltd [1971] 3 All ER 558 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 351
Courts of Judicature Act 1964, s. 25A, Sch. para 11
Rules of the High Court 1980, O. 22A, O. 23 r. 1(1)(b), (2), (3)

For the 1st & 3rd appellants - Shaari Nor; M/s Mohd Latip & Assoc
For the respondent - Loh Chon Mee; M/s Moi Teik Seng & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Application

[1] This is the plaintiff-respondent's ("the respondent's") application by way of summons in chambers in encl (16) seeking, *inter alia*, an order that the first defendant-appellant ("the appellant") provide security for costs in the sum of RM10,000 and as security for the appeal herein in the sum of RM33,000, to be paid into court within one month from the date of this order, failing which this appeal shall be deemed to have been struck out.

Respondent's *Locus Standi*

[2] En. Shaari Nor, learned counsel for, *inter alia*, the first appellant, submitted that the respondent does not have the *locus standi* to make an application for security for costs, as O. 23 r. 1 of the Rules of the High Court 1980 ("O. 23 r. 1") and s. 351 of the Companies Act 1965 ("s. 351") provide only for "the defendant" and not "the plaintiff" to make such an application. The appellants cited the following authorities:

1. *Naamlooze Vennootschap Beleggings Compagnie "Uranus" v. Bank of England and Others* [1948] 1 All ER 165 CA; and
2. *Dar International FEF Co v. Aon Ltd* [2004] 3 All ER 986

[3] For the respondent, learned counsel Miss Loh Chon Mee contended that the respondent is entitled to bring this application on the basis of O. 23 r. 1(1) and (3), and s. 351 as the first appellant is "the plaintiff" while the respondent is "the defendant" in this appeal. Support was sought in *Luminous Crossroads Sdn Bhd v. Lim Kong Huat Construction* [2002] 5 CLJ 100 HC.

[4] In my judgment, it is necessary to refer to the relevant portion of O. 23 r. 1(1)(b) which provides for security for costs of action etc. as follows:

> **1. Security for costs of action, etc (O. 23 r. 1)**
>
> (1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court:
>
> (a) ...;
>
> (b) ... that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so; or
>
> (c) ...;
>
> (d) ...;
>
> then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

[5] Order 23 r. 1(3) clarifies the position of a plaintiff and a defendant in the following words:

> (3) The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim.

[6] In addition, s. 351 provides that where a limited company is the plaintiff in any action or other legal proceedings, the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.

[7] Upon a proper construction of O. 23 r. 1(1) and (3) and s. 351, it is abundantly clear to me that on the application of "the defendant" to an action or other proceeding, the court has the power to make an order for security for costs in favour of "the defendant". In other words, a plaintiff is in no position to obtain an order of security for costs against the defendants who were

A exercising their right to defend themselves against attack: per Lord Greene MR in *Naamlooze, supra,* and per Mance LJ in *Dar International, supra.*

[8] The above two authorities cited for the defendant herein B reiterated the principle that a defendant is entitled to make an application for security for costs.

[9] The question that needs to be addressed before me is whether the respondent comes within the meaning of "a defendant" for the purpose of making this application for C security for costs pursuant to s. 351 read with O. 23 r. 1(1) and (3).

[10] It is important to observe that under O. 23 r. 1(1), an order for security for costs may be made "on the application of a D defendant to an action or other proceeding in the High Court". More specifically, the expression, "a defendant" to "other proceeding in the High Court" would in my judgment be the person defending the proceeding in the High Court. The proceeding when construed contextually must include the instant E appeal, in which the respondent is the party defending or exercising its right to defend against attack in this appeal. Pursuant to O. 23 r. 1(3), the respondent becomes the party in the position of "a defendant" in the appeal before me and is entitled to make this application for security for costs.

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[11] In this regard, an authority in point may be found in *Luminous Crossroads, supra,* in which there was an application by Lim Kong Huat Construction ("Lim") seeking an order, *inter alia,* for security for costs against Luminous Crossroads. The G application was opposed by Luminous Crossroads on the ground that it was a privilege accorded only to "a defendant" and that the matter was said to have originated in an arbitration proceeding, in which Lim had made a claim against Luminous Crossroads and so it was submitted that Lim was the plaintiff and H Luminous Crossroads, the defendant. After considering O. 23 r. 1(1), (2) and (3) read with s. 351, I held that a party is to be identified as "a plaintiff" or "a defendant" by reference to the title of the parties in the matter filed and heard in the High Court and not, as submitted for Luminous Crossroads, the matter before the I arbitrator. In the High Court, Luminous Crossroads was the party commencing the proceedings and was therefore the plaintiff while Lim was the defendant defending or exercising a right to defend against an attack in the High Court.

[12] In the circumstances, I hold that the appellant's contention herein is without merit.

Security For Appeal

[13] It was asserted for the appellant that the respondent's application for security for appeal in the judgment sum of RM33,000 is *mala fide* and an abuse of the process of court as there is no provision in the Rules of the High Court 1980 for such application, adding that there is already an application by the first appellant for stay of execution filed in the sessions court six months before the respondent's instant application. Reference was made to *The Royal Bank of Scotland Ltd v. Citrusdal Investments Ltd* [1971] 3 All ER 558.

[14] The respondent did not reply to the submission pertaining to the abuse of the process of court, but took the position that the application for security for appeal is an application for interim payment under O. 22A of the Rules of the High Court 1980 and the court is empowered to give such an order under s. 25A of the Courts of Judicature Act 1964.

[15] It is essential for me to dispose of the issue arising from two concurrent applications, *viz*. one for stay in the sessions court and the other before me for interim payment, in which the issues are substantially intertwined and involve a substantially similar subject matter ie, the stay or satisfaction of the judgment sum. These two applications are obvious illustrations of duplicity or multiplicity of proceedings.

[16] A case directly in point is to be found in *The Royal Bank of Scotland, supra*. There, the defendant-tenant whose lease had expired applied to the county court for a new tenancy. Whilst the proceedings were pending there, the plaintiff-landlord applied by originating summons to the High Court for a declaration, *inter alia*, that the lease had expired. The defendant applied to the High Court for, *inter alia*, a stay of proceedings on the ground, *inter alia*, of an abuse of the process of court in that they substantially duplicated the action already commenced between the same parties in the county court. Plowman J at p. 562 held that where matters involving substantially the same issues were raised in two different courts, it was desirable that they should be debated in only one of these two courts if by that means justice could be done. The learned judge added that since the parties and subject-

matter were the same in both suits and the issue to be tried was also substantially the same, the two sets of proceedings should not be allowed to proceed concurrently. Accordingly the plaintiff's originating summons was stayed until the defendants' application in the county court had been finally disposed of.

[17] The principle enunciated in *The Royal Bank of Scotland, supra,* has found statutory expression in para 11 of the Schedule to the Courts of Judicature Act 1964 which where relevant reads:

> Power to ... stay proceedings where by reason of multiplicity of proceedings in any court or courts, the proceedings ought not to be continued.

[18] In the circumstances, I would apply the practical procedural approach contained in para 11 of the Schedule to the Courts of Judicature Act 1964 and the principle enunciated in *The Royal Bank of Scotland, supra.*

Conclusion

[19] On the foregoing grounds, I make an order in terms of the security for costs and stay the second limb of this application for security of the judgment sum in the appeal until the final disposal of the application for stay of execution in the sessions court.

Costs

[20] As the terms of the above order have in effect put the parties' position in equilibrium, I order each party to bear its own costs in this application.